

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA BOLTE

Claimant

VS.

WAL-MART

Respondent

AND

AMERICAN HOME ASSURANCE

Insurance Carrier

Docket No. 1,023,295

ORDER

Respondent and its insurance carrier requested review of the June 29, 2006 Award by Special Administrative Law Judge (SALJ) Marvin Appling. The Board heard oral argument on September 20, 2006 in Wichita, Kansas.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. D. Steven Marsh, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that future medical benefits is only at issue to the extent that claimant sustained a permanent impairment attributable to her work-related accident. And claimant specifically conceded that there is no claim for reimbursement for prescription expenses claimant incurred as a result of her injury.

ISSUES

The SALJ concluded the claimant “aggravated her injury while at Wal-Mart” and awarded her a 10 percent impairment to the body as a whole.¹ In doing so, he relied upon the opinions expressed by Dr. Edward Prostic.

The respondent contends the substantial weight of the credible evidence, particularly the medical evidence, shows that the claimant did not suffer any additional impairment over and above her preexisting impairments caused by a 1996 work injury and a 2002 car accident. Thus, the SALJ’s Award should be modified to reflect a 0 percent permanent partial impairment.

Claimant argues that the Award should be affirmed in all respects.

The sole issue to be determined in this appeal is whether claimant sustained a permanent partial impairment as a result of her December 3, 2004 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties’ briefs and oral arguments, the Board finds the SALJ’s Award should be modified.

In 1994, the claimant ruptured two disks and ultimately had a surgical procedure which fused the vertebra at the L5-S1 level under the direction of Dr. David Malone. She was released to return to work for respondent following her recovery from that procedure. Then, on November 11, 2002, claimant was involved in a vehicular accident which, according to her, intensified the pain in her right hip and down her leg. Again, claimant was treated by Dr. Malone and he released her to return to work. The record does not disclose the date when claimant was returned to work. Nonetheless, she did resume her regular work activities with some limited restrictions as to lifting.² She was ultimately promoted to department manager and continued to work without incident up to December 3, 2004.

Claimant testified that before December 3, 2004, she was having low back, right leg and hip pain, albeit on an intermittent basis. She would regularly take Tylenol several times a week and sometimes she would even take Darvocet to control her pain. In November 2004 claimant was seen by Dr. Sandhu for her low back and hip pain complaints. On November 27, 2004, claimant had a MRI, at Dr. Sandhu’s request, to explore the source of her pain complaints.

¹ ALJ Award (June 29, 2006) at 3.

² R.H. Trans. at 36.

Then on December 3, 2004, claimant sustained an accidental injury at work. Claimant collided with a coworker and fell to the floor, landing on her buttocks. The resolution of the ultimate issue in this case turns upon whether the claimant sustained permanent injury as a result of that accident or whether her present complaints are attributable to her earlier injuries.

According to claimant, she immediately felt pain in her left hip and in her neck, across her lower back and down both her legs following the December 2004 injury.³ Respondent referred claimant to Dr. Allen Gillis for treatment, and he indicated that when he examined her on December 13, 2004, she had no significant findings that evidenced a new injury. Because claimant already had an appointment to see Dr. Malone for her ongoing complaints which pre-dated this claim, he recommended that she go ahead and see Dr. Malone. In the meantime, he gave her pain medications.

Claimant returned to see Dr. Gillis on January 7, 2005, and at that time claimant complained of bilateral pain in the hips and some numbness in her legs, with the right leg and hip being more problematic. Dr. Gillis testified that claimant's post accident complaints were the same as those she had been experiencing before her accident. He reviewed her MRI results and concluded there were no acute findings. He also noted claimant had no neurological changes. In short, he opined that all of claimant's complaints were preexisting. And it was his opinion that under the *Guides*⁴ claimant had no new ratable impairment.⁵

When deposed, Dr. Gillis reiterated his opinion that claimant had no permanent impairment. However, he further testified that he does not typically rate patients and generally refers them on to specialists for purposes of providing ratings.⁶ Nonetheless, he testified that he found no permanent impairment attributable to the December 2004 accident.

Claimant saw Dr. Edward Prostic on June 22, 2005 for evaluation at the request of her attorney. At that time, claimant was complaining of pain in both posterior hips with the left being worse than the right and descending to both ankles. Dr. Prostic noted claimant's pain was worse with sitting, bending, squatting, twisting, lifting, pushing and pulling.

³ *Id.* at 10.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, 4th edition. All references are to the 4th edition of the guides.

⁵ Gillis Depo. at 9.

⁶ *Id.* at 26-27.

Dr. Prostic opined that “more probably than not she has [an] annular tear of a lower lumbar disc” as a result of the December 3, 2004 accident.⁷ He recommended conservative treatment and assigned a 10 percent impairment to the body as a whole on a functional basis.⁸ Dr. Prostic explained that this 10 percent was due to the claimant’s probable annular tear and the loss of motion in her low back, although Dr. Prostic did not have the benefit of all the records pertaining to claimant’s earlier medical history. Other than the limitation of motion, he found claimant to be neurologically intact.

Claimant saw Dr. Paul Stein for an IME on October 14, 2005 at respondent’s request. Dr. Stein not only examined claimant, but he also reviewed over 650 pages of medical records documenting claimant’s care from the 1994 injury to the 2002 car accident, including the MRI reports. At the time of her examination with Dr. Stein her chief complaints were bilateral hip and leg pain. As for the left leg complaints, Dr. Stein noted a stocking type of symptomatology which, as he explained it, was not a valid indicator for radiculopathy. The symptoms did not follow any particular type of dermatome pattern, nor was there any structural or diagnostic explanation for the left leg symptoms.

Following his examination, Dr. Stein opined that “[t]here is no objective evidence of increased permanent partial impairment of function as result of the accident at Wal-Mart on 12/3/04.”⁹ He explained that while claimant presently bears a 20 percent impairment to the body as a whole DRE lumbosacral category IV of the 4th edition of the AMA Guides, this impairment is *not* attributable to the 2004 accident.¹⁰ Rather, the 20 percent is attributable to her earlier injuries and resulting surgical procedure. And the December 3, 2004 accident did not result in any findings that would change her functional classification. He went on to explain that “[b]ased on the lack of a structural change or new symptoms that could be documented, either on examination or on radiologic studies, I would have to say that at least from legal point of view [her injury] would be classified as a temporary aggravation.”¹¹ In short, claimant had a 20 percent impairment before her 2004 injury and afterwards, she had a 20 percent impairment. He further testified that he found no evidence of any annular tear as was noted by Dr. Prostic, although he conceded that Dr. Prostic may have seen the actual MRI films and that may account for their differing opinions.¹²

⁷ Prostic Depo at 11.

⁸ *Id.*, Ex.2 at 2.

⁹ Stein Depo., Ex. 2 at 6.

¹⁰ *Id.* at 20-21.

¹¹ *Id.* at 27.

¹² At oral argument claimant’s counsel acknowledged that Dr. Prostic did not see the actual MRI films.

The SALJ noted the varying physicians' opinions and relied upon those expressed by Dr. Prostic and awarded claimant a 10 percent permanent partial impairment to the whole body. The Board has considered this finding and concludes the Award should be modified.

The Board is not persuaded that claimant has sustained any additional permanent impairment as a result of her work-related accident in 2004. Although claimant certainly had immediate acute complaints following her fall, it does not appear, based upon these facts and the testimony of Dr. Gillis and Dr. Stein, that she suffered anything more than a temporary aggravation of her pre-existing conditions.

The Board is cognizant of claimant's contention that she had a need for increased pain medications following her fall. But the medical records indicate that in the weeks just before her fall in December 2004 claimant's back and hip complaints were of such significance that she was seeking out further evaluation and treatment from Dr. Malone. She had had a MRI in November, 2004, just before her fall and had an appointment to follow-up with Dr. Malone. Given the close proximity in time between these visits and claimant's fall in December 2004, the Board is unpersuaded that her subjective increase in pain is more likely than not attributable to her accident.

And Dr. Prostic's opinion that she likely has an annular tear and has restricted motion in her low back as justification for an additional 10 percent permanent partial impairment is equally unpersuasive. Dr. Prostic did not see the actual MRI results and admittedly made that assertion based only upon claimant's subjective complaints.

Accordingly, the SALJ's Award is hereby modified to reflect a 0 percent permanent partial impairment for the claimant's temporary aggravation of her pre-existing condition(s). Claimant is entitled to future medical benefits upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated June 29, 2006, is modified to reflect a 0 percent permanent partial impairment.

All other findings and conclusions contained within the SALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of October 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge